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Before the
Federal Communications Commission
Washington, D.C. 20554
NOV 8 2 58 PM '95

DISPATCHED BY

MM Docket No. 94-116

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Jefferson City, Cumberland Gap
Elizabethton, Tennessee and
Jonesville, Virginia)¹

RM-8507

RM-8567

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 26, 1995; Released: November 8, 1995

By the Chief, Allocations Branch:

1. At the request of Eaton P. Govan, III and Berton B. Cagle, Jr. ("petitioners"), licensee of both Station WEZG(FM) (formerly WUSK-FM), Channel 257A, Jefferson City, Tennessee, and Station WAEZ(FM) (formerly WUSJ-FM), Channel 257C3, Elizabethton, Tennessee, the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 5738 (1994), proposing the substitution of Channel 256A for Channel 257A at Jefferson City, the reallocation of Channel 256A from Jefferson City to Cumberland Gap, Tennessee, and modification of Station WEZG(FM)'s license to specify Cumberland Gap as the station's community of license. In addition, petitioners also request the substitution of Channel 257C2 for Channel 257C3 at Elizabethton, Tennessee, and modification of Station WAEZ(FM)'s license to specify operation on the higher powered channel. Petitioners filed comments restating their intention to apply for Channel 256A at Cumberland Gap and Channel 257C2 at Elizabethton.² Holston Valley Broadcasting Corporation ("HVBC") filed a counterproposal.³ Comments were filed by W.T. Cooper, Executive Vice President of Jefferson County Chamber of Commerce ("Cooper"), JBD, Inc. (JBD"), licensee of WXJB(FM), Harrogate, Tennessee, WFSM, Inc. ("WFSM"), licensee of Station WCTU(FM), Tazewell, Tennessee, Darrell Brittain ("Brittain"), County Executive of Claiborne County, Tennessee, Aileen S. Craft ("Craft"), licensee of Station WNTT-AM, Tazewell, Tennessee. HVBC and JBD filed reply comments. Petitioners, HVBC, David Hartley ("Hartley"), general manager of Stations WSWV(AM-FM), Pennington Gap, Virginia, Ewell Bledsoe ("Bledsoe"), Mayor of

Jonesville, Virginia, and John D. Douglas ("Douglas"), Mayor of Cumberland Gap filed responsive comments to the counterproposal.

2. In the *Notice*, petitioners were requested to furnish sufficient information to support a finding that Cumberland Gap is a community for allotment purposes. In response, petitioners state Cumberland Gap was incorporated as a city under the provisions of the laws of the State of Tennessee by an act of the General Assembly in 1907.⁴ Petitioners note that the community is governed by a Mayor and a Board of Aldermen. Cumberland Gap has a town hall, police department, several churches, retail commercial establishments including restaurants, motels, gift shops, service stations, post office, and general merchandise shops. Petitioners contend that the proposed allotment of Channel 256A to Cumberland Gap will move the station away from the Knoxville Urbanized Area, thus the population served would decline from the present 109,566 to 66,527 persons. Conversely, the upgrade of Station WAEZ(FM)'s facilities would provide service to an additional 93,766 persons. Petitioners believe the adoption of their proposal would be in the public interest since it will not deprive Jefferson City of its only radio station, and will provide Cumberland Gap with its first local aural transmission service.

3. In its counterproposal HVBC requested the allotment of Channel 256A to Jonesville, Virginia, as that community's first local service. HVBC states that Jonesville is an incorporated town with a current population of 927 persons. It is also the county seat of Lee County. HVBC submits that Jonesville has a mayor/council form of government, a police department, volunteer fire department, water system, sewer system, and a privately owned cable system. HVBC argues that Cumberland Gap, although listed in the 1990 U.S. Census and incorporated, is not a community for FM allotment purposes. HVBC submits that Cumberland has few commercial enterprises and no other indicia of community attributes. Furthermore, HVBC contends that the Cumberland Gap proposal violates Section 73.315 of the Commission's Rules which requires that a site be chosen with no major obstruction in the signal path. HVBC states that its engineering analysis reveals that Poor Valley Ridge, with elevations up to 1,700 AMSL, lies between petitioners' proposed site and Cumberland Gap. In view of this development, HVBC believes it is highly doubtful that a signal strength of 70 dBu or greater could be delivered to Cumberland Gap based on the severity of the terrain obstacle posed by Poor Valley Ridge. HVBC argues for the reasons it has presented, the Commission must deny petitioner's proposal to allot a FM channel to Cumberland Gap and grant its counterproposal.

4. JBD, WFSM, Cooper, Holiway, Craft, and Brittain submitted comments opposing the Cumberland Gap proposal. JBD argues adoption of the petitioners' proposal would deprive Jefferson City of its only nighttime service and would leave the community with only a 500 watt AM facility. JBD states that WUSK(FM) and WJFC(AM) are the only stations which serve Jefferson County, while Claiborne County, is served by 4 commercial and one

¹ The community of Jonesville, Virginia, has been added to the caption.

² As stated in the *Notice*, petitioners' request, although signed, failed to include an affidavit verifying statements contained in their petition, as required by Section 1.52 of the Commission's Rules. Petitioners were requested to correct the deficiency in

their responsive comments, and they have complied accordingly by filing an affidavit.

³ Public Notice of the filing of the counterproposal was given December 21, 1994, Report No. 2048.

⁴ Petitioners submitted a copy of the Charter of the Town of Cumberland Gap, Tennessee.

noncommercial local radio stations, as well as two commercial low power television stations. JDB submits that the people of Jefferson City and of Jefferson County have become accustomed to receiving the local nighttime service that Station WUSK(FM) provides. JDB argues that the public interest would not be served by the deletion of Jefferson County's only existing local nighttime service, simply to provide first service to Cumberland Gap, a community of only 210 persons, located in a county which has both a smaller population and significantly greater local day and nighttime broadcast service than does Jefferson County.

5. WFSM agrees with JDB's opposition noting that Cumberland is very small and the local business community is incapable of supporting any self-sustaining media. In addition to being very small, WFSM notes that Cumberland Gap is also a seasonal community with what economic activity that exists occurring as tourism during a few months with most of the remaining year quite economically sparse. In contrast, Jefferson City has a population of 6,000 and hosts a major Tennessee college campus (Carson-Newman University) which is active and ranked in several collegiate sports. WFSM asserts that petitioners seek to effect changes in the FM Table to afford themselves FM facilities in adjacent, larger, markets while purporting to serve other, small, communities. WFSM also questions whether petitioners' ability to meet the city grade coverage requirements due to a high likelihood of "shadowing" cause by the mountainous terrain. Holiway and Cooper state that Jefferson County is the fifteenth fastest growing county in Tennessee and deserves the service of a full-time radio station. Brittain and Craft contend that moving another radio station into Claiborne County will not serve the public inasmuch that the existing broadcasting facilities in the county are struggling for sufficient revenue to enable them to continue to provide service to the county.

6. JDB and HVBC also filed reply comments opposing petitioners' proposal. JDB states petitioners were not responsive to the Commission's *Notice* regarding the areas and populations which would either gain or lose service. Instead they only provided information reflecting the area, population, and FM services encompassed within the current and proposed 60 dBu contour of WUSK(FM). Furthermore, JDB argues the petitioners failed to advance any countervailing public interest benefits to offset the loss of service to Jefferson City, including the loss of that community's only nighttime transmission service. HVBC reiterates its concern regarding the community status of Cumberland Gap, as well as denoting the number of parties that have filed an opposition to the Cumberland Gap allotment. HVBC contends that the site selected by petitioners will not permit "line-of-sight" to Cumberland Gap as required by Section 73.315(b), because of the intervention of Poor Valley Ridge between Cumberland Gap and the proposed site.

7. In rebuttal, petitioners argue that HVBC's counterproposal is a carefully crafted ruse designed to thwart Station WAEZ(FM)'s upgrade and thus constitutes a strike petition. Petitioners argue that the Commission should examine the circumstances surrounding the filing of HVBC's counterproposal to determine HVBC's "true" intent.⁵ Petitioners further state that the proposed reallocation of Channel 256A to Cumberland Gap would provide service to 66,527 persons while the Jonesville counterproposal would only provide service 43,406 persons. In addition, seven incorporated cities would be encompassed by the 60 dBu contour of the proposed Cumberland Gap facility, while only two incorporated towns would receive service from the proposed channel at Jonesville. As an added benefit, the reallocation of Channel 256A would enable Station WAEZ(FM) at Elizabethton to upgrade, thus providing a new broadcast service to 93,766 persons. Petitioners contend the Cumberland Gap area is a vital and growing region with a diverse economic base. Auto traffic along U.S. Highway 25-E at Cumberland Gap is expected to double in the next 10 years. Whereas, the Jonesville area has very limited prospect for improvement. Petitioners believe the combined reallocation of WEZG(FM) to Cumberland Gap and the upgrade of WAEZ(FM) would provide a new broadcast service to a total of 160,293 permanent residents and over 1.3 million annual tourists.

8. HVBC filed further comments in response to petitioner's allegation that HVBC's counterproposal is a "strike petition". HVBC argues it has the right to participate in a channel allocation proceeding and to attempt to put forth a proposal which can be granted as a dispositive Section 307(b) preference. HVBC contends that a essential element of a "strike" pleading is whether the filer conducted a frequency study, citing, *Sumiton Broadcasting Co., Inc.*, 14 RR 2d 1000, 1006-07 (Rev. Bd. 1968). HVBC states that prior to the filing of its counterproposal, it investigated all commercial FM channels to determine whether one or more FM channels were available at Jonesville and found only Channel 256A was available.

9. Bledsoe filed comments opposing the allotment of Channel 256A to Jonesville, stating he believes HVBC is attempting to hamper petitioners and does not have the best interest of Jonesville in mind. Bledsoe contends that Jonesville receives broadcast signals from a number of stations who provide outstanding broadcast services and an additional station at Jonesville would have devastating effects upon existing stations. Furthermore, he argues that Jonesville is a very small community with an extremely limited commercial and economic base and believes that there is not enough local advertising revenues in Jonesville to support a radio station. Hartley agrees with Bledsoe that the adoption of the Jonesville counterproposal would pose a very real economic threat to existing stations. He states that Jonesville is a very small town with only a small retail community, thus advertising revenues for a new station would come from Pennington Gap, which already has existing radio service.

⁵ Petitioners raise several allegations regarding HVBC's counterproposal. Petitioners state that HVBC has no genuine or legitimate interest in operating a Class A broadcast station at Jonesville. They believe HVBC filed a counterproposal for the purpose of impeding, obstructing or delaying the grant of petitioners' proposed upgrade at Elizabethton. We disagree with petitioners' contentions. HVBC has an interested part in this

proceeding in that it has filed a counterproposal that suggests a mutually exclusive use for the channel proposed for Cumberland Gap. HVBC has stated in its counterproposal its present intention to apply for the channel if allotted to Jonesville. This is sufficient for acceptance of the counterproposal. Petitioners have offered no evidence as to why we should question HVBC's representation.

10. Douglas, representing the Cumberland Gap, states that the community is isolated geographically and its citizens could benefit greatly from the service of an FM station. He contends there are hundreds of thousands of tourists who visit Cumberland Gap each year to whom a broadcast facility could provide very valuable local news and information. Further, he argues that the business, civic and religious community would benefit greatly from a local radio station that would provide an outlet for discussion of local issues and for local self-expression.

DISCUSSION

11. A staff engineering analysis has confirmed HVBC's claim that the substitution of Channel 256A for Channel 257A at Jefferson City, the reallocation of Channel 256A from Jefferson City to Cumberland Gap, Tennessee, would violate Section 73.315(b) of the Commission's Rules. A terrain profile study reveals that there is a major obstruction in the line of sight path between the proposed antenna site for Channel 256A and Cumberland Gap. Since petitioner has failed to demonstrate the existence of a site that can provide line-of-sight service to the entire community, the proposal must be denied. *See e.g., Creswell, Oregon*, 3 FCC Rcd 4608 (1988), *recon. denied*, 4 FCC Rcd 7040 (1989) and *Bald Knob and Clarendon, Arkansas*, 6 FCC Rcd 7435 (1991).

12. Having found that petitioners' proposal is technically defective, we will adopt the proposal set forth by HVBC.⁶ We believe that the public interest would be served by allotting Channel 256A to Jonesville, Virginia,⁷ since this action would provide the community with its first local aural transmission service. Bledsoe and Hartley's argument that the adoption of the HVBC's counterproposal will pose a very real economic threat to existing stations, raises issues which the Commission has already determined are not relevant in either a licensing or allotment context. *See Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon. denied*, 4 FCC Rcd 2276 (1989); *Cheyenne, Wyoming*, 8 FCC Rcd 4473 (1993); and *Albion, Nebraska*, 10 FCC Rcd 3183 (1995).

13. A staff engineering analysis has determined that Channel 256A can be allotted to Jonesville, Virginia, in compliance with the minimum distance separating requirements of the Commission's Rules with a site restriction of 7.8 kilometers (4.9 miles) southwest of the community.⁸ The site restriction is necessary in order to avoid a short-spacing conflict to the licensed operation of Station WTFM(FM), Channel 253C, Kingsport, Tennessee.

14. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 26, 1995**, the FM

Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Jonesville, Virginia	256A

15. The window period for filing applications will open on **December 26, 1995**, and close on **January 26, 1996**.

16. Accordingly, IT IS FURTHER, That the petition for rule making submitted by Eaton P. Govan, III and Berton B. Cagle, Jr. to substitute Channel 256A for Channel 257A at Jefferson City, and reallocate Channel 256A from Jefferson City to Cumberland Gap, Tennessee, and to modify Station WEZG(FM)'s license to specify Cumberland Gap as the station's community of license; to substitute Channel 257C2 for Channel 257C3 at Elizabethton, Tennessee, and to modify Station WAEZ(FM)'s license to specify operation on the higher powered channel (RM-8507) IS DENIED.

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

⁶ Even if we had to make a comparison between the change of community proposal at Cumberland Gap, Tennessee, and the counterproposal for a new allotment at Jonesville, Virginia, under our FM allotment priorities, the Jonesville proposal would win. Although both proposals would result in a first local transmission service to their respective communities, under priority 3, the proposal at Jonesville, Virginia, would be preferred

because of its larger population (927 versus 210). *See Blanchard, Louisiana and Stephens, Arkansas*, 8 FCC Rcd 7083 (1993), *recon. denied*, 10 FCC Rcd 9828 (1995).

⁷ Jonesville, Virginia, is an incorporated community with a 1990 U.S. Census population of 927 persons.

⁸ The coordinates for Channel 256A at Jonesville are North Latitude 36-38-08 and West Longitude 83-10-04.